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Some Theoretical and Practical Problems in Formalizing the Juvenile Court Procedure

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SYMPOSIUM

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SOME THEORETICAL AND PRACTICAL PROBLEMS IN FORMALIZING THE JUVENILE COURT PROCEDURE

MODERATOR: The Student Bar Association of the University of North Dakota Law School would like to welcome you to what we hope to be a continuing program of symposiums on contemporary legal issues. Tonight's program is entitled, "Some Theoretical and Practical Problems in Formalizing the Juvenile Court Procedure." We are most fortunate to have with us a distinguished panel of guests and University of North Dakota faculty members. The first gentleman on my right, Mr. Vaughan Stapleton, is currently a research associate at the Yale Law School.* Mr. Stapleton received his bachelor's degree from Yale University, a master's in anthropology, and a PhD in sociology from Northwestern University. He has extensive experience in the field of juvenile delinquency, having been research director for the National Council of Juvenile Court Judges at the American Bar Center in Chicago. He was a lecturer at Northwestern University, where he taught a course entitled "Juvenile Courts and Juvenile Delinquency." He was also a consultant to the Russell Sage Conference on Child Development and the dministration of Juvenile Justice. He has written a number of articles in the field of juvenile delinquency and is currently writing a book with Professor Teitelbaum, "In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts." Also with us tonight, sitting next to Mr. Stapleton, is the Honorable A. C. Bakken, Judge of the First Judicial District for the County of Grand Forks and Juvenile Court

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Judge for this county. Seated next to him is Mrs. Myrna Haga, a Social Work Instructor at the University of North Dakota. She is currently teaching a seminar with Professor Teitelbaum on "Society and the Youthful Offender." She has been a staff social worker with the juvenile courts in St. Louis, and she received her bachelor's degree from North Dakota and her master's degree from Washington University in St. Louis. Seated next to her is Professor Teitelbaum, Assistant Professor of Law at the University of North Dakota.** He received his LL.B. from Harvard and his Master of Laws from Northwestern University. Professor Teitelbaum was staff attorney in the Chicago juvenile court under a Ford Foundation Grant and has also written several articles in the field of juvenile delinquency.***

The format of this symposium will be as follows. After an initial presentation by Mr. Stapleton, entitled "The Social Scientist's View of the Gault Decision," each panelist, if he wishes, will have time for a shorter presentation. After this, questions will be entertained from the audience. Our only request is that we would like you to direct the questions to a particular panelist.

I give you Mr. Stapleton—

STAPLETON: It is my very great pleasure to be here. I realize that in a time of rather dramatic domestic and international upheaval the problems of juvenile law might seem somewhat unimportant. But I think that in modern society we are faced with two inescapable problems. One is that there is juvenile crime and that it affects all of us either directly or indirectly. Certainly I was affected when my radio was lifted from my car, and those of you who have suffered the indignities of certain juvenile crimes must recognize that the problem exists in either a minor or major degree. If we take the word of most experts, it is a major problem in the United States today.

Secondly, all societies I know of accept the proposition that a juvenile is malleable. That is why they are called juveniles. A certain *rite de passage* is instituted at a given age, depending on the society, which enables the juvenile to become a full-fledged member of soceity—whether this be at the age of 13, 18 or 21 does not matter. But there is an age limit before which a juvenile is not accorded the status of an adult. And it is further assumed that societies decree that this juvenile be socialized into the mores of the parent culture. It is these two assumptions upon which I base my remarks tonight.

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Now, these remarks are not those of a person trained in law. I am, and have been introduced as, a social scientist, albeit one who has had a long standing interest in law and indeed who has specialized in the sociology of law. It is in this guise that I want to make some observations about the Supreme Court's historic decision *In re Gault*[1] which, as you know, granted certain constitutional rights to juveniles. These rights are the right to counsel, the privilege against self-incrimination, the right to timely notice of charges and the right to confrontation of hostile witnesses.

As a social scientist, I am particularly disturbed by the reasoning on which the majority opinion arrived at its decision, and I will claim for the purposes of this symposium that the reasoning was faulty on four basic counts. In its opinion, the majority apparently based a good part of its decision on four basic social science findings. They are: (1) that juvenile crime has increased, not decreased, since establishment of the juvenile justice system;[2] (2) that the label of delinquency is inherently stigmatizing;[3] (3) that the manner in which a youth perceives the legal system has profound effects for his future development, making it incumbent upon the legal system to present itself in all aspects as a fair and judicious one;[4] and (4) that institutionalization, even for treatment purposes is a form of punishment rather than of rehabilitation.[5] Let me direct myself to these points rather briefly. The assumption that juvenile crime has increased, not decreased, since the establishment of the juvenile justice system fails to take into account a classic instrument of social science with which we can determine the positive effects of given social action—that is, the control group.[6] If juvenile delinquency has increased, why? Is it because the population has increased? Is it because crime has increased generally? Or is it because, as the Court assumes in its opinion, juvenile courts have failed in their duty? The Court does not in its opinion show a comparable control group that justifies this proposition. *After all, it is equally plausible, however unlikely it may sound, that juvenile delinquency might have increased by a 50% ratio rate had not juvenile courts been in existence.* The Supreme Court fails to state that proposition. Moreover, the Court supports its conclusion by showing that a large number of inhabitants of a California juvenile institution were recidivists, implying thereby failure in earlier processing. But, again, I ask that the Supreme Court take a look at the total

1. *In re* Gault, 387 U.S. 1 (1967).
2. *Id.* at 20, n. 6, 21-22.
3. *Id.* at 23-25.
4. *Id.* at 26.
5. *Id.* at 27.
6. *See* H. ZEISEL, H. KALVEN & B. BUCHOLZ, DELAY IN THE COURT 241-42 (1959); Schwartz & Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274 (1967).

population of the juvenile court, that is, all juveniles who go through juvenile court in a given period of time—and ask how many return. Is this not an equally important fact in determining the rate of recidivism? We do not know the number of juveniles who have gone to juvenile court and have never come back, or whether this is an accurate indication of whether juvenile courts work or not. I submit that, in its reasoning, the Supreme Court should have taken this factor into account.

The Court's second point is that the label of delinquency is inherently stigmatizing. It is a dramatic point and it makes a lot of common sense. But to the best of my knowledge there is only one empirical study of the stigmatizing effect of the criminal record—Professors Schwartz and Skolnick's "Two Studies of Legal Stigma"[7]—where they found that legal stigma has a detrimental effect and further that it has an effect in terms of the person's future career. This work goes, of course, to criminal records. To the best of my knowledge, there have been no similar studies on stigmatizing effects of juvenile records. Although everyone likes to speak about it, no one really knows what the effects are. And, indeed, I might argue that a smart juvenile could logically turn a juvenile record into a potential asset, by arguing that "I am now 21 years of age and applying for a job. At the age of 16 I stole a car, but as you see, I have had a clean record since the age of 16. I have worked to support my mother, who is a widow; therefore, I can be considered a rehabilitated citizen of society. And, therefore, I am entitled to this particular job." What can be so stigmatizing about a record that could be presented in this way?

More importantly, records are kept on all of our lives. Each of us in this room has a dossier, possibly in F.B.I. records, certainly with the Internal Revenue Service, and certainly with the Social Security Administration. There is an extensive credit record on each and every one of us. The issue then is not so much the potential stigmatizing effects of juvenile records, I submit, but the legitimate and illegitimate use of such records. The Supreme Court's attention should properly have been placed not on the potential stigmatizing effects of the records, but upon the probability or possibility of expungement of such records, so that they could not be used against a juvenile at a later point in his life.

The Supreme Court's third point—the manner in which a youth preceives the legal system and its effect for his future development as an adult member of society—is based primarily on theoretical work by David Matza, published in a pioneering book entilted *Delin-*

7. Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROB. 133 (1962).

quency and Drift.[8] He hypothesizes that one cause of juvenile delinquency is that juveniles perceive the system as essentially unfair, and as it is unfair, the juvenile "cops-out." Since he cannot make it in the system and since the system is not fair to him, he does not want to have anything to do with it. Matza's book is a fine theoretical work. It is based on no empirical data. Two empirical studies have been done about children's perception of the fairness of the system. One is by Stanton Wheeler on the Boston juvenile courts.[9] He found, by investigating juveniles who have been incarcerated in institutions, that less than 10 percent perceived their institutionalization as being unfair. Certainly that is not a high percentage. They do not like it; there is no doubt about that—but unfair it is not.

The second set of data comes from our own experimental study of two juvenile courts,[10] where again less than 10 percent of the juveniles passing through the system, whether they had a lawyer or not, perceived their treatment by the system as being unfair. The question of the effect on juveniles of the juvenile court is, I submit, one for future empirical inquiry.

Finally, institutionalization, even for treatment, is considered a form of punishment rather than rehabilitation by the Court. This is perhaps the Supreme Court's most damning argument, and it makes a great deal of sense because none of us likes to be locked up or even likes to think about being locked up. At the same time, I can point to empirical studies from California where diagnosis has been made of certain types of juveniles which indicate that for a certain maturity level of juveniles—this is not an age level, but a maturity level arrived at by psychological diagnosis—institutionalilzation perhaps has a better therapeutic effect than release to the community, in terms of future rehabilitation.[11] Carefully controlled studies of semi-incarceration, half-way houses and mandatory probation indicates that such forms of treatment do have an effect.

Now I agree that if institutionalization had no effect or a detrimental effect, the Supreme Court would have been correct in arriving at its decision, but, again, the Court did not take a look at opposing evidence and again I submit that it made an error of fact.

All this notwithstanding, *Gault* is now the law of the land. What has this done in terms of the present state of juvenile justice? The second part of my thesis tonight is that it has taken the burden from the juvenile court judge and placed it squarely on the shoulders

8. D. MATZA, DELINQUENCY AND DRIFT (1962).
9. Baum & Wheeler, *Becoming an Inmate,* in CONTROLLING DELINQUENTS 153 (S. Wheeler, ed. 1968).
10. *See* N. LEFSTEIN & V. STAPLETON, COUNSEL IN JUVENILE COURTS: AN EXPERIMENTAL STUDY, National Council of Juvenile Court Judges, Chicago, Illinois (1967).
11. Warren, *The Community Treatment Project,* in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 671 (N. Johnston et al., ed., 2nd ed., 1970).

of the lawyer. The lawyer's dilemma, as hypothesized in the President's Task Force Commission[12] and in other writings, relates to his position at the time of trial in those cases where guilt is known by the lawyer because the juvenile admits the offense. Does he go before the court and admit the offense? Does he submit every defense the law of the land allows to zealously represent his client, as recommended by the American Bar Association Canons of Ethics for Criminal Cases?[13] Does he adopt a quasi-criminal approach whereby he will defend a client in certain circumstances, but not in others?

We have, as the result of an experimental study of two courts, code-named Gotham and Zenith—distinctive information on this question.[14] I will present the information for one of these cities—Zenith—a large mid-western city in which project attorneys were able to have petitions dismissed and their clients completely and freely released in 54% of their cases. I must emphasize for those social scientists present that the cases were assigned to the lawyers at random; the lawyers did not have a choice in picking their cases, so they got good ones and they got bad ones. This 54% dismissal ratio should be compared with a 40% dismissal ratio in the control group. At the same time, the project lawyers' commitment ratio was reduced from 12.2% to 7%.

The real question is, how many of the guilty go free. As part of the project we had the lawyers fill out case reports. In a full 19 cases out of 188 recorded, although the youth admitted his guilt to the lawyer, the attorney entered the denial in court. Of these cases, 68% were dismissed outright, only one client was committed and only three were put on probation. In another two cases, a finding of delinquency was not entered, but the cases continued for a period of time after which, assuming the youth's good behavior, the case would be dismissed.

But the 19 do not stand alone. The 19 must be considered with another five cases where the youth admitted to part but not all of the charges facing him. This was usually a multiple-charge case. In all five, or 100% of those cases, the case was dismissed outright. What is the lawyer's obligation both to his client and to society?

It might be argued that if these children were young, immature, or had committed minor crimes, the lawyer's action in these cases was thoroughly defensible, especially in light of traditional juvenile

12. President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 34 (1967) (hereinafter cited as TASK FORCE REPORT).

13. *See* A.B.A. Canons of Professional Ethics, Canon 5.

14. The data which follow are taken from a manuscript by V. Stapleton & L. Teitelbaum, tentatively entitled *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts*. The manuscript was supported by Russell Sage Grant No. 9470-42-55646.

court philosophy where we want to give the kid every break. But I report from the written report:

> A profile of Zenith's 19 cases of full denial in the face of the youth's full admission sheds considerable doubt on the hypothesis that the youths were fully innocent. Only two of these cases could be considered in the younger 10-12 age range, while the majority fell into the 13-14 age range. Neither were the offenses committed either minor or juvenile in nature. All offenses would have been classified as felonies if the offender had been an adult. Of the 19, we recorded three as crimes against persons, seven as possession of a deadly weapon, eight as crimes against property, and one final case logged as possession of marijuana. Nor apparently can these youths be exculpated by virtue of spotless records. Less than half, 42% had no prior record of any kind. Five had prior police records, three were currently on probation, and an equal number had prior juvenile court records but were not put on probation at the time of the filing of the petition. As a consequence of the lawyer's legal action, we recorded the following: in a separate tabulation of the reasons for the findings we note that only one of the youths was committed and three placed on probation. The power of the project attorneys to invoke the adversary system was apparent in examination of the reason for dismissal of the remaining 13 cases. The state was unable to prove six of those cases [remember the lawyer had knowledge of absolute guilt, this is the Zenith 19, not the full 24 cases where the child admitted the entire offense]; four cases were dismissed due to the failure of necessary witnesses to show up for adjudicatory hearing, a motion to dismiss was entered and granted by the court. Finally, the State did not choose to prosecute in the remaining three cases.

Now in presenting every defense that the law of the land permits, I submit that the Zenith attorneys were fully within the range of the Canons of Ethics as they apply in criminal cases. But what about juvenile cases; do they really apply? The *Gault* decision has placed the lawyer, I think, in the uncomfortable role, involving a decision that does not go only to the potential rehabilitation effects of the juvenile court but also may suggest a duty to the social order. Should known delinquents be released?

We have a case in point. It is illustrative of the problem. I submit that it is not an unusual case. C. W. was a 13-year old with a prior station house record of 18 arrests for curfew, burglary, and two prior court referrals for burglary for which he was on pobation at the time of an additional filing for burglary. Between the time of the project attorney's taking of the case and the initial adjudicatory hearing, C. W. was arrested again—for criminal trespass to an auto.

In presenting his case, the defense counsel was able to persuade the prosecutor that the State did not have sufficient evidence to

uphold the second charge of criminal trespass to an auto. The initial petition later was also dismissed, much to the probation officer's dismay, through the use of a legal technicality—the complaining witness was an invalid and being housebound, could not appear in court to testify to the allegation of burglary from her home. The judge granted a dismissal of the case.

Now it is clear that our Zenith attorney was quite successful from his client's point of view in obtaining C. W.'s release. We do not know the future career of C. W. The project ended shortly thereafter. I submit that on common sense terms and on any predictability scale, C. W. is going to get into trouble in the very near future. It is also revealed in the case report that the attorney was somewhat disturbed by his action, and I quote from the case report (I think it is a most revealing quote): "It might also be added that the comfortable bromide in these circumstances 'home is as good as anything' may not be acceptable either. There seems no real doubt that Mrs. W is an alcoholic and that the home circumstances are very close to intolerable. None of the children go to school, because Mrs. W is now living with a sister of hers and does not want to enroll the children and then have them transferred. At the same time, she has been with this sister for some six to eight months, and according to the probation officer has taken no steps toward moving, however often she asserts that she intends to do so in the near future. It is his belief that she really has no plans for moving in the near future, and that as a result the children are not going to go to school. The apartment in which they are living is very badly overcrowded; the living conditions are pretty close to intolerable. One may further ask whether the simple fact that C. went to school would be meaningful. He claims physical distress while attending classes, including ringing in his ears; and there is every reason to believe that he is subject to some rather vicious teasing because of a scar on his head. Further, his IQ is right around the mental retardation level, and his performance is severely handicapped by his emotional difficulties. To the best of my knowledge there is no institution within the control of the Board of Education which is suited to a boy with his difficulties; and, as observed above, it does not seem that there is any [State] institution which is suited as a practical matter to his needs."

I ask of the symposium, what should the duty of the attorney be? This is a practical and pressing problem, for if in 12% of the cases which appear before a major juvenile court we have knowledge of guilt and the lawyer is able to get approximately 78% of those cases dismissed completely, we submit not only an obligation to the child but also to the state of possible damaging results.

As my final point tonight, I would like to entertain the thesis

that there is a possible solution to the lawyer's dilemma. I call for resolution of this problem in two stages. First, a preadjudication hearing in which social science testimony is presented. There is presedent for this in the President's Task Force Report on Juvenile Delinquency, which calls for pre-judicial dispositions which should be made as early in the course of official agency contact as possible.[15] An ideal research design in such a case—and here is where I call upon an ideology which may be equally obnoxious to social scientists and lawyers alike but will go a long way towards helping resolve the problem in the future—is to have a design where 50 cases such as C. W. are accorded the full treatment of the criminal due process model. In other words, their lawyers will react in the same way that the Zenith lawyers react. The lawyers will act in the full adversarial manner.

In another 50 cases the lawyer fully admits the involvement and leaves the child to the mercies of the juvenile court and whatever treatment facilities it has. A final 50 cases would be subjected to a pretrial hearing where conflicting social science testimony would be brought to bear. Individual experts would be brought in. A decision would be made on the amenability of treatment of C. W. or cases like him to various rehabilitation programs. If such programs were available, it would then be the lawyer's affirmative duty to go before the juvenile court and admit, suggesting that the juvenile court withhold jurisdiction for the cases of treatment. If such treatment were not available within the regular state regulation, I place an affirmative obligation upon the attorney to subject the state to legal action. What that legal action is I leave to the lawyer. To enjoin upon the state treatment facilities for this child, either through the Board of Education or the state juvenile delinquency authority or through the proposed youth boards as suggested by the President's Task Force. The cases in each group would, of course, be randomly assigned.

The second portion of this solution envisions a state statute which enables a juvenile court to withhold a delinquency finding for the purposes of treatment; and if treatment is shown to be effective, no delinquency finding is entered, thus removing any possibility of stigmatizing effects on the record. Further, adequate expungement facilities should be provided for those cases which are found delinquent but later show effects of treatment, so the juvenile can expunge his record and claim that he has never been in juvenile court.

It is a radical program, but I submit that we are all part of an experimental and record-keeping society,[16] and that we owe to our-

15. TASK FORCE REPORT 18-19 (1967).
16. *See* D. Campbell, *Reform as Experiment* 24 AMER. PSYCHOLOGIST 409 (1969).

selves and especiallly to the juveniles who come before the nation's juvenile courts the opportunity for this kind of experimental treatment. After all, it is not so different from what middle class delinquency treatment is right now. We might be hypothesizing that we are offering to the poor—and the poor are the recipients of the nation's juvenile court services—the same rehabilitative services that are now available to the middle and upper classes. That is, if a middle class child is found to be in trouble, he goes to the police station. Daddy goes down to the police station and says, "Please don't send him to the juvenile court; I will provide for him going to Taft Military School" or "I will provide for him going to the Windsor Mountain School" (for psychiatrically disturbed children). And the police and the court hold off their judgment because the individual parent has taken the responsibility upon himself to provide affirmative action on behalf of that juvenile.

Why, I ask, of this symposium and of my fellow panelists, cannot the law enjoin upon the state the same type of affirmative action? I thank you.

JUDGE BAKKEN: What I always remember about the *Gault* decision is a statement by Justice Fortas, who wrote the opinion, that the juvenile receives the "worst of both worlds,"[17] which in the reasoning back of the decision, now makes it necessary to extend at least the minimum of due process to the juveniles. Prior to this decision the doctrine of parens patriae was followed exclusively in my experience, and I am sure this was generallly true throughout the country—which really means that the court takes the position of knowing what is best, and the juvenile was encouraged to disclose all and the court would then, within the limits of the alternatives, select whatever corrective action it though best in this situation. Of course, that still exists, and the alternatives are, in my experience, too limited in many respects; but I really do feel that in North Dakota we have gained by the result of the *Gault* decision. In fact, I think it is safe to say that passage of the Uniform Juvenile Court Acts, which was adopted by the 1969 legislature,[18] was brought about at this early date mainly by the *Gault* decision.

I was a State's attorney for about ten years in two counties in North Dakota—these were smaller counties—and one thing I found, and it disturbed me, was that there was very little uniformity in juvenile court proceedings. At that time we had what we called Juvenile Commissioners—the name was changed to Juvenile Supervisors in the new Juvenile Court Act. These Juvenile Commissioners

17. *In re* Gault, 387 U.S. 1, 18, n. 23 (1967), quoting Kent v. United States, 383 U.S. 541, 556 (1966).
18. N.D. CENT. CODE § 27-20-01 *et seq.* (Supp. 1969).

had no specific requirements as to qualifications; we would find in many cases they would come out of education, retired school educators, and, even though they had experience in dealing with students, many of the problems that faced them in dealing with delinquent students or juveniles were something quite different. I was disappointed many times by the lack of uniformity and lack of professionalism that existed. I think we still have that problem to some degree in the smaller counties, but I certainly found here in Grand Forks County there is a much higher standard. I have also found that, with the implementation of the Uniform Juvenile Court Act, our procedures are becoming much more uniform. We do have Judge Eugene Burdick in Williston who is on the National Commission for Uniform Laws, and he met with the group who drafted and developed this Uniform Juvenile Court Act. He has been very helpful to the rest of the district judges in this state in developing uniform forms for our use, and I know that this has improved our situation greatly in North Dakota.

The matter of attorneys was mentioned by our speaker. I believe it is safe to say in Grand Forks County now, that almost 75% of all juveniles, when they get to the stage of a petition alleging delinquency or unruliness, request court-appointed counsel if their parents are not financially able to furnish an attorney. We, as a matter of course, make this appointment under the *Gault* decision. This, I believe, is a great improvement over the pre-*In re Gault* days when you would have the State's Attorney or his assistant and the Juvenile Commissioner on one side of the table with, I might add, the welfare department people, and on the other side, the juvenile and maybe one parent, two if he were lucky, to try to represent him in this court proceeding. Since the Uniform Juvenile Court Act, the *Gault* decision and the *Miranda*[19] decision, that has been changed drastically because now we routinely appoint counsel to represent these juveniles who are charged with either unruliness or delinquency.

I do not have the statistics to go into the matter our speaker discussed on what is the lawyer's position at the time of trial. Of course, every lawyer has a different attitude as to what is in the best interests of the child, that is as to recommending an admission or to stand on every technicality that he can possibly find. I have had experiences both ways. I would say this though—that if an attorney takes the tough position, to stand on every technicality that he can find, to object to the admission of any statement unless there is an absolute compliance with the *Miranda* warnings, then the situation goes back somewhat to what it was before *In re Gault* when the judge had to take the burden upon himself and just decide whether or not he feels in the circumstances he should let this evidence in.

19. Miranda v. Arizona, 384 U.S. 486 (1966).

Of course, there is always the risk of reversal on appeal when that is done, but then the ball is passed back again to the attorney. These points were very interesting to me when the matter was opened here. If you have any questions, I will be glad to do what I can after the other speakers.

MRS. HAGA: As social workers, we sometimes get the juvenile after he has already been through the process that you people have already talked about, namely adjudication; we very often come in on disposition. There are a few things that I am concerned about with the advent of attorneys to the court system in which, up until now, we have maybe felt a kind of vested interest. But from what I have seen and heard stated about the juvenile's conception of justice and how important it is for the juvenile to feel that he has been dealt with fairly in a courtroom, I think this is necessary. I am not willing to see a child who is innocent institutionalized, nor do I think he should be put on probation. I think that even this is a form of taking away some of his rights, namely that he at least has to appear in person on certain days at certain times where he would otherwise be able to follow his own course of action.

It has been mentioned that absent due process of law, even a child who has violated the law may not feel he has been justly treated and goes on to resist rehabilitation by the court, where we, as social workers come into the picture. If a child is malleable, as Mr. Stapleton suggests—and I would offer that if this were not true, then social work as a profession would rapidly go out of business—what about his feeling of justice if he is removed from the court on a technicality? Does this not often distort a child's sense of justice? I feel that it may: I also think that it is going to be up to lawyers in the juvenile court system to determine in what frame of reference we do get these children if they are committed by the court. In other words, I would hope the attorney would not go in saying "I'm going to get you off if I can; I know you did it and you know you did it; but maybe they did not follow the proper procedure when you were arrested"—the child, as I understand it, may on certain technicalities be released. I am wondering if saying this to a child, or the manner in which it is presented, is not going to say to the child that if you are found under the jurisdiction of the court, you will receive punishment; in other words, it is putting a punitive aspect on what the court tries to do with these children once they are adjudicated delinquent.

Having worked in a court system, I find it hard enough to work with kids who are there with some idea of why they are there, without having to come in with the idea that maybe they just did not get an attorney who worked hard enough for them, or that the at-

torney gave them the idea that the thing to do really would be to get them off. I think that how hard our job is going to be once these children are adjudicated is up to these people in the courtroom. I understand—although I have not worked in the courts since *In re Gault* has been passed, except for a couple of sessions—that social workers who are there find it very different than it was previously. I, for one, have learned very well what the hearsay rule is. I seem to have used it an awful lot before this—hearsay, that is. I am not sure this is wrong. I would like, I think, to see lawyers in our juvenile court system. I think a child does have rights and these should be protected; but I cannot say that the guilty child, even though it is known that he is guilty, should be released from juvenile court jurisdiction unless—and I hope this is not true and I think we do have to do something about it as Mr. Stapleton suggests—our treatment procedure, what we do for a child, is not valid. In that case, there may be no use referring any child for treatment but I would offer that there are methods. I think we have to look into them a little more closely. I do not think it is enough any more to say "it worked, so let us do it again," whether we know why it works or not. I think we have to take more responsibility, maybe in the nature of a study such as has been done in treatment with juveniles, testing the different types of methods and why they worked or why they did not. I think the disciplines and the courts are also going to have to address themselves to that, if the juvenile court system is going to continue to operate. There is no use referring the child for treatment if the treatment is not there to be had. I think it is unfortunate that many people say of our institutions, "better leave them in a home, any kind of a home, than an institution." From some of the institutions I have seen, I think I would almost go along with this; however, I would have to say that I do not think this is the way it has to be.

To go back to my original point, I think it is going to make a difference to us, who get the children after they have been through the courtroom, how other people, especially the attorneys who defend them, are going to put forth what the juvenile court can do or will do to them. I hope that you will present it at least this positively: that if they do not get off on a technicality that there is something to offer in the court system for the child's rehabilitation.

If there are any questions afterward, I would be more than happy to try to answer them.

MR. TEITELBAUM: Let me begin by conceding that I feel slightly uncomfortable in defending the *Gault* decision indirectly since, as a number of persons here know, I have taken the opportunity from time to time to criticize it. But since it is Mr. Stapleton's ox that is being gored and not mine, I feel free to switch grounds.

One could discuss Mr. Stapleton's analysis of the *Gault* decision in some detail, but because the hour hand is sweeping on, I think that I will leave that and go directly to his very challenging proposal for experiment. As I understand it, the idea is to divide all delinquency cases into three groups. These groups are defined in terms of the attorney's posture when the client has admitted his involvement in the alleged offense to his lawyer. In 50 of these cases the accused may resist state intervention by use of adversarial defense tactics. In another 50 the lawyer is enjoined to admit the child's involvement. At this point the lawyer may urge upon an evaluation team or teams some dispositional scheme. If the dispositional scheme which the lawyer desires is not available at this time, the lawyer may and should take steps to secure that program for his client. In the last group of 50 the attorney would play no active role whatsoever after entering an admission.

The first of these schemes is consistent with the adversarial defense as it is known in criminal cases. The last of these is in keeping with the traditional juvenile court practice in those cases where the child has admitted his guilt. The middle one, taken with the other two, is a new and very challenging one.

There are, I think, substantial difficulties with Mr. Stapleton's experimental proposition. Its major justification lies, of course, in the fact that it provides a design by which the benefits of various approaches to behavioral abnormality can be assessed with some rigor. At the same time I take it that it is perfectly clear that the securing of socially useful information, however desirable, is limited by other norms or values and that there are instances in which ideological or ethical norms outweigh empirical interest. To take only one example: I presume that the best way to determine the tolerance of human bodies for falls is to take human bodies and drop them in controlled states—25 feet, 50 feet, 75 feet, 100 feet. Of course, this is "horrible"; nevertheless it is perfectly clear that the design which I have described is the best and perhaps the only way of testing this particular question. I hope it is clear that an experiment of this sort, while perhaps yielding socially useful information, is forbidden by other norms which define the place of the individual in society.

There is, then, a fundamental question whether the empirical gain in any experiment is outweighed by other societal values. Underlying Mr. Stapleton's scheme is a simple but very important proposition. It clearly and necessarily denies the existence of any right on the part of the admittedly guilty child to resist societal intervention. The fact that a part of the class—the 50 who have the adversarial lawyer—can set up the various defenses allowed under the law of the land does not mean that children as a group have the right

to resist intervention. After all, I take it that one cannot claim something as a right if its exercise depends solely upon random assignment, rather than on something which inheres in one's individuality or personality. The individual's posture vis-a-vis authority in Mr. Stapleton's proposition is determined solely by the cast of a die and not by anything in the relationship of the individual to the state.

Would this cost be accepted if the subject were an adult and the system were the criminal process? I take it that the logic of Mr. Stapleton's analysis suggests that the answer would be in the affirmative. Lawyers, however, resist that suggestion because it fundamentally changes the relationship of the individual and society. The criminal process takes as a basic assumption the conflict of interest between the state, which seeks to act upon the individual, and the individual's interest in avoiding the consequences of that action. Like all conflict systems, the norms and rules by which this conflict is to be resolved are carefully established and rigorously enforced. These procedures are, in a very real sense, as important as the outcome of the confrontation. Thus, if I am charged with a crime and you are the state, I am entitled to say: "You, as the state, may not act upon me against my will until you have satisfied certain prerequisites to that intervention, such as proof beyond a reasonablle doubt and proof by evidence which has been obtained in a constitutionally permissible fashion." In short, the criminal system posits the right of the defendant to challenge all official exertions of authority at every stage of the procedure. He need not do so, but he may do so. In the words of the *Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice,* "the essence of the adversary system is challenged. The survival of our system of criminal justice and the values it advances depends upon a constant searching and creative questioning of official decisions and assertions of authority at every stage of the process. The adversary system is the institution devised by our legal order for the proper reconciliation of our public and private interests in the crucial areas of penal regulation. As such it makes essential and invaluable contributions to the maintenance of a free society."[20] I take it, that it follows from this that if a state were to staff a prison and to give it a rehabilitative orientation, as indeed has been suggested and at most attempted, it nevertheless follows that the defendant could invoke his right as an individual to resist authoritative intervention in his career—even though that intervention be assertedly helpful rather than harmful, *from the State's point of view.*

20. Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 11 (1963); *See also* Skolnick, *Social Control in the Adversary System,* 11 J. CONFL. RES. 52 (1967).

If experimentation of this sort is impermissible in the criminal forum, is the cost substantially less when the subject is a child and the forum a juvenile court? This question, I would submit, is one of political philosophy rather than of empirical knowledge. To some extent, I suppose the juvenile court movement has assumed that delinquency proceedings are cooperative rather than conflict organizations, since the hearing is said to be "in the interest of" and not "against" the child.[21] Of course, this merely assumes the entire question away. We may concede that, for *some* legal purposes, children have a dependent rather than an independent status. I am not about to say that a 14 year old has the same rights and responsibilities as an adult. But the proper issue is whether, *for this purpose*, children can be denied a measure of distance from the state in the name of research. This is in large part the same question which has faced, though without recognition and with a different focus, juvenile courts since their inception. And this question must be faced and answered before Mr. Stepleton's test tubes can be filled.

Let me make one last point; I make it separately because it is relatively minor and specific. Part of the evaluational suggestion put forth by Mr. Stapleton in his second proposition might involve the following situation. Let us suppose for the sake of argument that I represented C. W. and C. W. admits his guilt to me. As the facts suggested by Mr. Stapleton indicate, there are no adequate facilities available for handling C. W. in the jurisdiction. I take it that under his plan, I still must admit guilt, but I must then affirmatively seek legal action to secure the needed rehabilitative scheme. In the first place, there may be no legal remedy at all. The decision to use state funds for the construction of an institution is a legislative decision and cannot, so far as I know, be compelled by judicial action. The usual remedy for inadequate treatment is not construction of a new facility but release on habeas corpus.[22] This alternative, however, clearly subverts the purpose of Mr. Stapleton's proposition.

Secondly, the legal action will, in many cases, do nothing for the client on whose behalf it is urged. Introduction, discussion, passage of a bill, appropriation of funds, and then construction of a physical facility takes time—a lot of time. By the time the building is finally up and staff is hired and the doors are opened, C. W. may well have spent several years in industrial school, have been released, have achieved his majority, and be wholly without the authority of the juvenile court. Thus by implication the attorney's role is defined

21. *See* State v. Scholl, 167 Wis. 504, 167 N.W. 830 (1918).
22. *E.g.*, Rouse v. Cameron, 373 F.2d 451 (D.C.Cir. 1966); *See generally Symposium*:

in terms of some future good to be achieved for persons not his clients, but arguably at the expense of the client whom he represents in this case. This, I suggest, is a novel and somewhat troublesome definition of the role of the attorney.

QUESTION: What do you do in the situation where the lawyer is fully convinced that the juvenile has committed a crime but the juvenile has not admitted it, or what do you do in the situation where the juvenile admits the crime but the lawyer is convinced that he is admitting a crime that he did not commit, which I think you will concede happens. Why do you exclude them from your program?

MR. STAPLETON: For the sake of simplicity, I suggested the plan described tonight because it presents the very clear problem of the known guilty who are going free; this is a logical class with which to commence experimentation. Now I am going to start sounding like the classic Nazi surgeon who is experimenting with frozen bodies. In the instance that I suggested, I am worried about C. W. as an individual person and as a political man. As a member of the experimenting society—and I suggest that the experimenting society is a rational society, because if you do not have more certain knowledge than what we now go on, you are going on guesswork—I argue that more certain knowledge is better than no knowledge whatsoever. A logical extension of my design would reach all such cases; indeed this project evolved out of a program where I, as the Inquisitor General, randomly assigned cases to project attorneys. In other words, the clients that were assigned to our attorneys were free to turn down those attorneys, but their initial assignment to our attorneys, whose case loads were very low and who had been specially prepared in juvenile court law and were especially enjoined to present an adversarial defense, was not up to the juvenile, or the court, or the attorney—it was made by a process which removes such decision from all human error.

QUESTION: You recognize the fact that you are removing the guilt-determining process from the court to an individual.

MR STAPLETON: In the design that I propose tonight? Yes. But I say that the *Gault* decision has done that anyway. It has placed an unconscionable dual role on the attorney, one that the court had to assume before. Now the attorney has to take over. If the attorney is cast in the classic adversarial role, in the classic adversarial posture of Clarence Darrow, he is going to go in there and fight tooth and nail for his client. But there are many attorneys now practicing in juvenile court who now take the opposite approach and who indeed say that, in the case of C. W., it would be his affirmative obligation

to admit the charge. What I am suggesting is an experimental program that would provide affirmative information on the most useful role from a certain perspective.

QUESTION: I read somewhere that in the Far East there is a custom of helping beggars, but the person who helps the beggar becomes responsible for him with the result that he permanently is in his charge. Are you asking this attorney who makes this vigorous adversary defense to assume the role of the person who helps the beggars, and be responsible for his juvenile until the matter is ultimately resolved?

MR. STAPLETON: In one-third of the cases I would like to see this tried, if not by the attorney alone, at least by the attorney in conjunction with either a probation worker, a social worker, or with a team of social scientists. And again I base this proposition on something that Mrs. Haga has emphasized — that we firmly believe that children are malleable. If children are not malleable, if we did not believe that they could be socialized into the framework of our social system, then it is all for naught, this whole question becomes moot and this whole symposium is nonsensical. But we do adopt the proposition that children are mallelable, even up to the age of 25 and 30.

MR. TEITELBAUM: Let me say that I do not see anything particularly inconsistent between the classic attorney's role and the assumption of additional responsibility. It may be that an attorney can find suitable resources in the community for his client. If he can, it seems to me that the only obstacle to pursuing this end may be one of time. Certainly nothing in his role forbids him from seeking to secure the services of the community for his client. Indeed I suspect a good number of lawyers in many instances do just that; it is just simply that they do not choose to submit their client to the jurisdiction of the state for this purpose.

QUESTION: Mr. Stapleton, when you experiment I would like to know what your objective is, generally speaking—because as I understand the juvenile system the juvenile delinquent does not necessarily, as it stands today, have to be a "criminal." He could be guilty of committing an act which, if committed by an adult, would not necessarily be a crime, such as breaking curfew. How do you equate your experiment in relation to these factors as far as juvenile delinquency is concerned?

MR. STAPLETON: In the ideal experimental design we have enough individuals so that these factors can be taken into account by statistical analysis. What I am looking for in terms of concrete re-

sults are a number of indices which I call upon you to help me create let us say rates of recidivism. A juvenile convicted of delinquency is not a criminal, and I suggest that we provide for the expungement of that record. At the same time we can keep tabs on that juvenile since juveniles do have records, and we find out rates of recidivism—either by further referral to the police department or further referral to the courts, also further referral to the criminal courts, if he should get into later trouble.

An experimental design divides up the population in such a way that you have a number of groups, each of which can be compared to one another. Let's say that the design that I presented tonight, that of design 2, the one that Mr. Teitelbaum finds so objectionable from a legal point of view, shows an affirmative result in lowering rates of recidivism and, on certain psychological scales, the children so treated show greater maturity after a length of time and greater intellectual development—then would this not be sufficient evidence to indicate to the ABA Committee on Ethics that this be the preferred ethical standard for lawyers in juvenile courts? In other words, are behavioral indices relevant in the study of juveniles? Classically they have been. The Supreme Court seems to rely on behavioral indices in making its decisions. And if the Supreme Court is going to leap in with both feet that way, then I submit it is up to me as a social scientist to come back with both feet from my perspective. And I am offering the kind of design that permits this. Indeed, I agree with Mr. Justice Harlan's dissent where he argues that the full imposition of constitutional rights, and I quote from him, "may inadvertantly have served to discourage these very efforts to find more satisfactory solutions for the problems of juvenile crime and may thus now hamper enlightenend development of the systems of juvenile courts."[23] So at least one Justice agrees with my position.

J. BAKKEN: I perhaps should have added that in the Uniform Juvenile Court Act the initial procedure is what is called "an informal adjustment" and this is handled strictly by the juvenile supervisor.[24] Of course, you go to the qualifications of the juvenile supervisor in that case, but if your juvenile supervisor is trained in the psychology of social work, the fields you are referring to, it seems to me that at that point the present set-up in this state gives some of what Mr. Stapleton has suggested. The next step is what is referred to as a "referee's hearing," although this I admit gets more to the legal phase again, because to be a referee under the act the person

23. *In re* Gault, 387 U.S. 1, 65, 77 (1967) (Harlan, J., concurring in part and dissenting in part).

24. N.D. CENT. CODE § 27-20-10 (Supp. 1969).

is required to be a lawyer.[25] But both procedures are used before you get to a formal petition and a hearing in juvenile court. The juvenile does not get into juvenile court before the juvenile judge under either of these proceedings and the juvenile supervisor and the referree (of course these are cases where there usually is an admission of guilt) has authority to set up the treatment of rehabilitation procedures that he feels are in the best interests of the juvenile.

MR. TEITELBAUM: Let me suggest what I think are a couple of distinctions between the procedure that Judge Bakken has just described under the Uniform Juvenile Court Act and Mr. Stapleton's proposition. As I read the Uniform Juvenile Court Act, which, of course, is now enacted in North Dakota, informal adjustment cannot result in incarceration.[26] Similarly, I believe even a referee's finding cannot result in incarceration unless certified by the district judge.[27] Under Mr. Stapleton's proposition, I take it, this quasi-administrative or quasi-judicial body (I am not quite sure which) has power to order commitment or whatever treatment seems called for. That distinction seems to me fundamental.

MR. STAPLETON: Yes, you are right; I firmly agree.

J. BAKKEN: I would like to ask Mr. Stapleton what his views are on the right to trial by jury. The Supreme Court is wrestling with that proposition right now[28] and, of course, that would take this *Gault* matter further down the primrose path.

MR. STAPLETON: My views are that of a classic social scientist; and as you might guess, I propose an experimental program. We can set up for a year in a given jurisdiction a certain number of cases that are tried by jury and a certain number of cases that are tried under the classical method. Then we find out what the outcomes are. With this experimental program, I then can provide you, future legislators in the body politic, with more certain knowledge about what to do. So I would ask the Supreme Court to withhold its decision if it is going to base its decision on social science fact, for more certain knowledge in this area.

MR. TEITELBAUM: I was simply wondering whether or not Mr. Stapleton was volunteering his brothers in the sociological profession as the defendants in these trial cases?

MR. STAPLETON: Fortunately we are not juveniles, if we are brothers in the sociological profession.

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25. N.D. CENT. CODE § 27-20-07 (Supp. 1969).
26. *See* N.D. CENT. CODE § 27-20-10(1) & (2) (Supp. 1969).
27. *See* N.D. CENT. CODE § 27-20-07(6) (Supp. 1969).
28. *In re* Burrus, No. 128 (October Term, 1970).

QUESTION: I thought Professor Teitelbaum's first objection was to the design of the experiment. But, after understanding that the results of the experiment would permit the American Bar Association to alter its Code of Professional Ethics as it applies to juveniles, it seems to me your principal problem is one of further extension. It seems to me we do not have to limit it to juvenile cases; we might very well have the same situation applied to the criminal courts — after all, we also regard adults as malleable to a large extent. Why not see what the effect would be of having an experiment in which lawyers were compelled to withdraw if they came to the conclusion that their criminal defendants were, in fact, guilty, and see what effect that would have on the crime rate? It seems to me that this would clearly indicate that the effect on the system is not the only consideration, and perhaps this is the force to Professor Teitelbaum's objection. I admit that this is something more of a statement than a question, but could you please expand on that?

MR. STAPLETON: First of all, I do believe that a rigorous reading of the *Gault* decision indicates that it was based largely on sociological factors; the Court had to go a long way to show that the juvenile court process did not work. Professor Teitelbaum's objection are, I think, well taken in terms of protection of the norms of the Americian judicial system. At the same time, these very norms are now being called into question by people who would like to do away with certain number of them. I think that there are good arguments to be made on both sides. My experimenting society I call one of staged reforms, in which your design for lawyers withdrawing from certain cases where they have certain knowledge of guilt would be perfectly rational if permitted by the judiciary or by the legislators, so that we could experiment. Unfortunately, we get involved with people's rights in such experiments; and, therefore, we are not allowed to experiment. Concrete experiments have been done—the Vra bail bond study involved a privilege, not a right; and provided concrete results which led to the new release on recognizance rule in New York and a number of other states. That was a pure experimental design where a certain number of individuals were denied the privilege of release on recognizance and a certain number of individuals were given that privilege. But it came out with concrete results, and once the results were out the experiment ended and positive legislative action was then taken.

QUESTION for Mr. Teitelbaum: Since Mr. Stapleton is advocating going between two extremes—the pre-*Gault* and the post-*Gault* extremes—what is so offensive about doing the experiment he is suggesting in view of the fact that an admitted criminal, generally speaking, in the United States, is supposed to owe his body to the

state to do with whatever the state wills. If you commit a felony, if you murder somebody, if you commit an atrocious crime in the United States, you forfeit your body through incarceration, generally speaking; that is, if you have admitted and been proved guilty. If you say a person owes a debt to society; that is, he has committed an offense and he owes a debt to society, what is so terrible about going back to pre-*Gault* law to come up with a solution that is based on scientific facts that can be verified.

MR. TEITELBAUM: The hooker in your statement is in the change of language. In your initial statement you said that an *admitted* felon owes his body to the state. Upon reflection, I am sure you will agree with me that this is not the law and has never been the law, if you are referring to non-judicial admissions, as Mr. Stapleton is. If, however, guilt is judicially established, whether on his plea or not, I take it that—still within normative limits—the state may act upon an individual. There is, of course, a constitutional injunction against cruel and unusual punishment and things of that nature. The fact, however, that guilt has to be proved indicates something about the relationship between the individual and society. Before society can act on me, it must go through certain procedures which form a buffer between society and my individuality and freedom. Until it has done so, the state is disabled from acting upon me. I insist that this is essentially a judgment of political philosophy.

MR. STAPLETON: A short reply to Mr. Teitelbaum's remarks. I would assume that you would not consider that state action in requiring juveniles to go to school is at all coercive or the juveniles perceive it as being coercive.

MR. TEITELBAUM: I assume it is and they may.

MR. STAPLETON: Why not grant rights of due process to juveniles in terms of appealing decisions by state school boards to send them to school?

MR. TEITELBAUM: I consider that . . .

MR. STAPLETON: I mean, the state does interfere in juvenile lives.

MR. TEITELBAUM: I do not contest that for a moment; nor does it deter me that that may properly be termed coercive. There are lots of areas in which both adults and juveniles are coerced in circumstances which do not require the application of the due process requirements which exist in criminal prosecutions. However, this is something of a sliding scale. The more you interfere with liberty, I take it, the more likely that procedures of a certain sort are

appropriate, and that was my point. The question really is what process is due here, not whether *any* process is due.

QUESTION for Mr. Stapleton: You recognized that there were certain normative values that in a very real way interfered with your experimental society. As I understood you, you said that these are values that are set by institutions in our society, by the legislatures. Are there any normative values for you as an individual and a social scientist that interfere with the experimental society that you would posit as being of a higher value and, if so, what are they?

MR. STAPLETON: You have put a question I have wanted to answer all evening. There are certain normative values which I follow. They are the normative values of science. I will state the two principal fundamental hypotheses coming from Karl Popper, a very distinguished philosopher of science: First, "the game of science is in principle without end. He who decides that one day scientific statements do not call for any further test and that they can be regarded as finally verified retires from that game." As a social scientist, I do not intend to retire from that game. Statements from me are always open to be verified or disqualified on the basis of certain fundamental tests. Secondly, "once a hypothesis has been proposed and tested and has proved its mettle, it may not be allowed to drop out without good reason."[29] A good reason may be, for instance, replacement of a hypothesis with another which is better testable or the falsification of one of the consequences of the hypothesis. In effect, I am arguing, I suppose, for a 1984-ish type of society, in which, if you will cast me in the role of the devil, that social scientists and lawyers—the knowledgeable people—are going to be in a position to impose upon the body politic a set of programs of rational reform whereby we can decide what is the best effect, the best test, and then put that into full scale effect at a later time. I think that such programs, if implemented in the past, would have prevented such monstrous disasters as public housing programs, public welfare scandals and the rest of the problems that we are faced with in our increasingly socialized society.

QUESTION: There are no other independent normative values for you.

MR. STAPLETON: No

QUESTION: Is science necessarily a game?

MR. STAPLETON: Let us term this as rhetoric. Science as

29. K. R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 53-54 (1961).

science; the study of science. It is the game of science insofar as we all play games—you play the game as a lawyer, you play the game as a social worker, you play the game as a student. The proposition might be restated: "The role of science"—let us substitute the word role for game in this sense—"The role of science is in principle without end and he who decides one day that scientific statements do not call for any further test he retires from the game."

QUESTION: In view of Mr. Stapleton's statement, which is valid—that the juvenile has a very malleable mind—I would like to know at what age you would have the cut-off between juvenile and adult.

MR. STAPLETON: If you want to adopt my rationale to its bloody and bitter end—to the age of 90, because all people are malleable and certain research has indicated that the processes of socialization do not stop at any given age. We learn throughout our lives, both as children and as adults. I am advocating the experimenting society for all people; that is why I agreed earlier that the experimenting society I hypothesized earlier for the juvenile court can and should be applied to the criminal model as well.

JUDGE BAKKEN: I think I draw my conclusions from the experience that I have had, and that is that even though the act sets the age at 18,[30] which is really a reduction from our original 21-year old statute, as a practical matter very few juveniles, either girls or boys, are given rehabilitation or treatment under the disposition hearing after delinquency or unruliness has been determined over the age of 17. The impression I get is that when they become 17 or approaching 18, say 17½, if there is any prior record, there is a waiver requested and they go into adult court, on the feeling that the malleable stage has been passed, so far as the alternatives are concerned for treatment under the present setup.

MRS HAGA: My feeling is that the personality remains malleable. I think maybe it reduces somewhat in this respect, but I do not think I can give a point at which this is going to stop.

MR. TEITELBAUM: If I have to give numbers, which I guess you are asking for, I would say between the ages of 10 and 17, assuming you are speaking of delinquency jurisdiction. If you are asking for a rationale for either number, I cannot give you one. The upper age limit and the lower age limit should depend in large part on facilities available. There is no point in having a 7 year old juvenile delinquent who cannot usefully be placed in any institution

30. N.D. CENT. CODE § 27-20-02(1) (a) (Supp. 1969).

in the state. You may treat him as neglected or dependent; that is, as something other than delinquent, but do not treat him as delinquent if you can do absolutely nothing. I picked 17 because it is between 16 and 18.

QUESTION: Mrs. Haga in her remarks said that she was disturbed by an attorney's role in getting the child off. Do you see this as the attorney's role?

MR. TEITELBAUM: I can avoid the question wholly by saying it depends on the child's preferred position. But let us assume the case in which I have reason to believe, because he told me and there is corroborative evidence, that the child did in fact commit the offense alleged. Let us also assume this child is quite adamant that he has no desire at all to undergo the rehabilitative treatment of the court. I take it, then, that my role is to offer him every defense the law allows—every one—because I insist that is his right before the juvenile court.

Let me also respond to a phrase that was tossed around from time to time, and that is the idea of getting people off on legal technicalities. Now I assume that a "legal technicality" is nothing more than a rule which happens to be inconvenient or unattractive at the moment to the person making the characterization. I do not assume that the privilege against self-incrimination is a technicality. History indicates that it is " of the essence of our scheme of ordered liberty"—not to coin a phrase. I take it that dismissal of the case because of the failure of the state to produce any competent evidence whatsoever—which is, after all, the precise situation in the C. W. case—is not a technicality. It goes to the ability of the state to perform its duty when it seeks to act authoritatively upon an individual.

QUESTION for Mr. Teitelbaum and Mr. Stapleton: It has been mentioned tonight that the next step the Supreme Court will take for juveniles will be trial by jury. If they go to trial by jury, Mr. Teitelbaum, would you as an attorney like to see the jury consist of peers of the juvenile: if so, why or why not. I would ask the same question to Mr. Stapleton as a sociologist—would you want children to be their jury?

MR. STAPLETON: As a sociologist, I would want to put it to the test, of course, but my gut feeling would be that a jury of peers would probably be far tougher on their contemporaries than a jury of adults. This has been the case in quasi-penal and penal institutions for juveniles where juries have been set up for trying infractions of rules within those institutions. It turns out that juveniles are pretty harsh on their own contemporaries. If you want leniency

as a standard, I suggest a jury of adults. If you want harshness as a standard, I suggest a jury of juveniles.

MR. TEITELBAUM: Just to prove that Mr. Stapleton and I can work well together, I agree very much on this point. I do not think that I would like to put a client before a jury of his peers, because I think, quite frankly, they would hang him. I would much rather have an older jury.

QUESTION: How do you view punishment toward the juvenile? Do you feel that punishment, in other words, incarceration, rather than treatment would be beneficial to the child?

MR. STAPLETON: I think that I have to refer to Margaret Q. Warren's studies in California.[31] They indicate that, for certain types of individuals (she identifies something like 10 or 11 maturity levels of development) punishment serves a positive value; that certain types of juveniles cannot respond to rational authority but do respond to coercive authority far better than they do under any other system. Anecdotal evidence comes from my experience as a parent where we have three systems of justice in the home, two of which operate at this time. One is "mommy justice" which is appealable—to daddy. "Daddy justice" is nonappealable. Then there is abstract justice. My children are not old enough for abstract justice; therefore punishment tends to become a norm which is presumably used for a social good.

QUESTION: I will preface this by saying I do not really believe your statement at the beginning of your talk, Mr. Stapleton, that you suffer from the disability, if that is the proper word, of being unfamiliar with juvenile philosophy and the study of law. When you are talking about legal technicalities, I do not think you really intend to suggest that this is a legal bag of tricks that the lawyer uses, so he can collect his money from his client. Indeed, these legal rules reflect a long history, with many instances of empirical support that shows they have a place in the truth-determining process. Secondly, these rules reflect a judicial decision that they are necessary in order to enforce sanctions created by our society, either through the legislature or through the Constitution, against illegal government action. The courts have been very reluctant to form that second set of rules and have only done so on the basis that this is the only way to enforce governmental limits. Does not the juvenile as well as the adult have the right to this protection and would you not say it is necessary for him to feel he is being dealt with fairly; that one of the real advantages of using this lawyer's bag of tricks

31. Warren, *Supra* n. 11.

is that the court recognizes, and the client hopefully will recognize, that the state cannot use illegal action in order to convict him even if he did in fact commit the crime?

MR. STAPLETON: First of all, that statement must be footnoted. Obviously legal technicalities are not technicalities, as recognized by both you and Mr. Teitelbaum. Nevertheless, the statement was made on purpose, because it is a statement that is used again and again by juvenile court judges in this nation's courts and by social workers to indicate a certain distrust of the lawyer's bag of tricks. After all, when you take a look at the Zenith 19 it does seem, if you are an outsider, that it is a bag of tricks. You have got a crippled witness who cannot make it into court; and perhaps the state's attorney in this particular jurisdiction is too lazy to go out and take a statement from her or to provide ambulance service to get her down to court. Nevertheless, the lawyer, it seems to me, is under some sort of injunction, a moral duty perhaps, if he could forget the Code of Ethics of the American Bar Association for the minute, to the protection of the society norm and to the norm of treatment of the individual. These norms are in constant conflict at all times and you are protecting yourselves, both you and Mr. Teitelbaum and the other hard-core lawyers, behind a code of ethics which recognizes only one system. Now the European penal code does not necessarily operate this way, if I understand it at all correctly.

QUESTION: Do you think it is ever possible to believe the notion of guilt has no meaning in a particular context? For example, a plea of guilty admits (1) the fact that I did the act, (2) that the act is characterized as an offense under the law. Thus a lawyer is quite free in suggesting to his client who did the act not to plead guilty because a higher court might decide that the particular fact, which is quite consistent with the attitude of the lawyer towards his client's guilt in having him sing dumb.

MR STAPLETON: Under Mr. Teitelbaum's tutelage I was very careful to exclude such cases as criminal trespass to auto which requires knowledge on the participant's part that the auto was indeed stolen. Each of the Zenith 19 involved an act which would typically be characterized as a felony, in each it appeared that the child had knowledge that he did do the act, did admit it to the lawyer, and there was sufficient evidence to indicate that the act was done. So that I have been, I think, reasonably careful in my sociological analysis.

QUESTION: I am somewhat puzzled because I think I heard Professor Stapleton say something to Professor Goldberg about some

kind of a moral or ethical principle we should invoke when the witness just happened to be off in a wheelchair someplace and could not come in. Now this sounds to me like some kind of a normative value beyond the scope of normative values that you as a social scientist adopted earlier. From where are you drawing these, or are these just applied to other people and not social scientists?

MR. STAPLETON: They apply to all people, but let us just take it within the framework of the juvenile court where I have observed, in another study, that four dominant normative themes carry throughout cases from both judge's statements and lawyer's statements. One is protection of the social order; we are concerned about releasing criminals back on the streets because they might commit some act which will injure somebody or do some harm to some thing. The second normative value is the treatment of the individual himself that there is a positive injunction upon the state to provide treatment when the case can be proved. The third normative value is a bureaucratic norm; we want to get the case through and over with. The fourth normative value is the due process model which, until *Gault,* was not typically applied in juvenile courts. Now that this model *is* applied to juvenile courts, I suggest that there is increasing conflict among these norms, and conflict between normative values produces the kind of rôle conflict which I suggest now rests heavily upon the attorney. I am asking for a program, I am asking for suggestions, whereby we can remove some of the role conflict which now falls on the head of the attorney. Now if this can only be provided by adopting the present standards of the American Bar Association's Canons of Ethics, in other words "warm zeal" in the defense of the client, then so be it. But I suggest if this judgment be made on the basis of social science knowledge, then we had better use social science knowledge. If it is to be made on the basis of a normative principle, make it and I will live under it as a member of the society. But you cannot, as *Gault* does, try to use social science fact to back up normative values. That is like trying to decide whether God exists or not on the basis of empirical evidence—and that argument was had out a long time ago.

MODERATOR: Would any of the panelists care to make closing remarks?

JUDGE BAKKEN: Well, I would like to say in defense of *In re Gault* that the attorneys that have worked my court, have in my judgment, given fair and adequate representation in the delinquency part of the hearing. Under the Uniform Code there is a delinquency hearing. If after that hearing is concluded, the juvenile is declared delinquent we go into a separate hearing called a disposition hearing. I believe that under *Gault* the attorneys have been a great aid to

the court in suggesting alternatives. Once delinquency determination has been made by the court the attorneys have been a great help along with the social service workers in suggesting and furnishing alternatives for treatment and rehabilitation. So all in all I feel that the *Gault* decision was long overdue and I am happy to have it to work under.

MR. TEITELBAUM: I should like to clear up two things which I may have made obscure—which would not be at all unusual. The first is that, while I have problems with *Gault*, I do not think it is fundamentally wrong. I share Mr. Stapleton's reservations about the way the Court characterized a good deal of the evidence it used. However, I think that perhaps too much can be made of that. I do not say Mr. Stapleton does, because I think all of his points were well taken, but *Gault* can be viewed in another light.

If you start from the proposition that a juvenile is a "person," you may face the question of whether or not society can justify according him lesser rights than an adult when both are faced with incarceration for what may be a substantial period of time. If that is the premise from which you begin, the burden of persuasion may lie not on the opponents of the juvenile court movement as it was traditionally constituted, but on the proponents of the system. In that case, all that the *Gault* case may really be saying is that the evidence offered by the proponents of the system with the lesser guarantees is not persuasive. Indeed, the information available seems to argue the other way. This is the posture of the case, the court may still err in its characterization and appreciation of the social science material that it uses, but that would not fundamentally affect the decision made.

The second point is that I do not believe that social science is inappropriate in studies of the legal system. My whole argument has been that there are, however, norms which surround our legal system which, in a number of instances, may say that certain kinds of research are not permitted for ethical, ideological or political reasons. That is not to say you cannot do useful research in any circumstances; that is not even to say you cannot do it in a good number of circumstances. It is simply to say that there is a point at which the ideology of our society, of our political structure, demands that you not act upon the individual even if the information you would gain by so acting may be said to be socially useful.

MODERATOR: On behalf of the Student Bar Association and the students who are present here, we thank each and every one of you for a very informative evening.